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Federalism, the Constitution, and the Brady Act: States' Rights and the National Government - Printz v. United States

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FEDERALISM, THE CONSTITUTION, AND THE BRADY ACT: STATES' RIGHTS AND THE NATIONAL GOVERNMENT

Printz v. United States, 521 U.S. 898 (1997)

*Barry C. Campbell**

I. INTRODUCTION

Some topics are quick to bring about heated political and personal debates; topics such as taxes, foreign policy, healthcare, and even welfare readily prompt a discussion between advocates on both sides of the various issues. A more obscure topic, federalism—that is, states' rights—also brings about many deep-seated reactions. Under our system, the ruling bodies are divided into two levels: federal and state governments. While each is supreme within its own sphere, the Constitution delegates power to the federal government and reserves power to the states. Disputes often arise when the federal government attempts to intrude in an area that is traditionally within the realm of state authority.

The Second Amendment to the United States Constitution explicitly states that citizens have the right to bear arms.[1] However, are there any restrictions placed on this right? Who, constitutionally, has the power to dictate the manner by which firearms may be purchased? Should the federal government have total autonomy in this area, or should the states? What about relying on cooperative federalism?

This Note attempts to analyze the issue of federalism and gun control by examining the United States Supreme Court's opinion in *Printz v. United States*,[2] which declared provisions of the Brady Act unconstitutional. The issue of states' rights takes a paramount position in this analysis. This Note examines cases dealing with the relationship of power between the federal and state governments.

II. FACTS

Petitioner Jay Printz was both the coroner and sheriff of Ravalli County, Montana.[3] Printz, in his capacity as sheriff, was the Chief Law Enforcement Officer ("CLEO") for Ravalli County.[4] Printz "was commanded by 18 U.S.C. [§] 922(s) to perform background checks and make legal determinations concerning handgun purchases, to destroy records on purchases, and to explain denials."[5]

Sheriff Printz's duties were statutorily defined.[6] As a CLEO, Sheriff Printz was to "preserve the peace, arrest persons who commit public offenses, suppress

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1. U.S. CONST. amend. II.
2. 521 U.S. 898 (1997).
3. Brief for Petitioner at 2, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1478).
4. *Id.*
5. *Id.*
6. *Id.* at 3.

riots, attend court, keep the detention center, and lead search and rescue units."[7] In addition to his duties as a CLEO, Printz also served as the county coroner.[8] In that capacity, Printz was in charge of holding inquests, determining causes of death, and notifying next of kin.[9]

Printz's staff included an "undersheriff, [four] detectives, a lieutenant, a patrol sergeant, and [seven] deputies. Ravalli County has 30,000 residents in 2400 square miles."[10] Generally, at any given time, only two deputies were on patrol.[11]

According to 18 U.S.C. § 922(s)'s mandate, Printz was to search the following databases to determine a candidate's fitness to own a firearm:[12] the National Crime Information Center ("NCIC"), the Criminal Justice Information network ("CJIN"), "county court criminal records, which may be hand-searched for criminal convictions and restorations of rights, but would require as much as six hours driving time one way . . . ," state hospital records, civil records, and any other applicable records.[13] Printz stated that he had neither an adequate budget nor the manpower to conduct these searches.[14]

A. Sheriff Mack

Petitioner Richard Mack, like Printz, was a sheriff and thus a CLEO.[15] Mack was the sheriff for Graham County, Arizona, a "sparsely populated rural county of 4500 square miles inhabited by 28,000 residents."[16] Sheriff Mack's office was staffed by only twelve officers, including himself.[17]

Mack, like Sheriff Printz, asserted that the Brady Act ("Act") "require[d] him to search nine categories of records, . . . having varying degrees of accessibility."[18] He claimed that his statutorily defined duties did not include searches of this type, nor did his budget and personnel numbers allow him to conduct the searches.[19]

Sheriff Mack filed suit, alleging that the Brady Act was unconstitutional because it exceeded congressional power under Article I, Section 8 of the United States Constitution.[20] Mack also claimed that, as enacted, the Act violated the Tenth and Thirteenth Amendments.[21] Finally, Mack alleged that the Act was "unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment."[22] As a remedy, Mack sought a "permanent injunction against [the government's] enforcement of the Brady Act."[23]

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 4
13. *Id.*
14. *Id.*
15. Mack v. United States, 856 F. Supp. 1372, 1375 (D. Ariz. 1994).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

The original case was heard by the United States District Court for the District of Arizona.[24] The district court first found, contrary to the government's urging, that Sheriff Mack had standing to challenge the Act.[25] Standing in this case stemmed from statutory provisions calling for criminal sanctions for a knowing violation of the Act.[26] These provisions placed Sheriff Mack "at risk of criminal sanctions should he decide to disobey the statute."[27] Additionally, the district court found that Mack had a "sufficient state interest in the outcome of the proceedings to justify standing . . . ."[28]

The district court then analyzed Sheriff Mack's allegations regarding the unconstitutionality of the Act and held that the "Brady Act's provision mandating that state law enforcement officials perform a background investigation exceed[ed] Congressional powers under the Commerce Clause, thereby violating the Tenth Amendment."[29] The court took the analysis a step further than Mack's complaint.[30] The court held that the *voluntary* provisions of the Act, which were held constitutional, were severable from the remainder of the Act and stated that an "invalid provision is severable if the balance of the legislation is capable of functioning independently from the invalid provision, and the statute functions, in the absence of the objectionable provision, 'in a *manner* consistent with the intent of Congress.'"[31] In its order, the district court declared that 18 U.S.C. § 922(s)(2) was unconstitutional and that the federal government was permanently enjoined from enforcing that particular section of the Act.[32]

B. Sheriff Printz

Sheriff Printz's case was heard in the United States District Court for the District of Montana, Missoula Division, on May 16, 1994.[33] Printz, like Mack, brought suit alleging that the Brady Act was unconstitutional.[34] Printz specifically alleged that the Act exceeded the authority "delegated to Congress by the United States Constitution . . . and [that it] violate[d] the Tenth Amendment."[35] Printz prayed for relief in the form of both a declaratory judgment stating that the Act was unconstitutional and a permanent injunction against its operation.[36]

The district court first had to determine if Printz had standing to challenge the Act.[37] The district court, after analyzing the elements for standing, concluded that Printz was in a position to challenge the constitutionality of the Act.[38] Printz argued that the provisions of the Act subjected him to criminal sanctions for fail-

24. *Id.* at 1372.
25. *Id.* at 1378.
26. *Id.* at 1376.
27. *Id.*
28. *Id.* at 1377.
29. *Id.* at 1381.
30. *Id.* at 1382.
31. *Id.* at 1383 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987)).
32. *Id.* at 1384.
33. Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994).
34. *Id.* at 1506.
35. *Id.*
36. *Id.*
37. *Id.* at 1507.
38. *Id.*

ure to comply with the statute.[39] Additionally, he claimed that the "background check provision require[d] CLEOs to perform some type of background check in every case . . . ."[40]

Printz's argument focused on the Act and whether Congress had, by enacting it, exceeded its constitutional power.[41] Printz specifically alleged that the Act exceeded congressional power because the "Act mandate[d] duties on the CLEOs . . . exceeding Congress' authority under Article I, Section 8 . . ." of the Constitution.[42] In conjunction with this argument was a second argument that the Act violated the Tenth Amendment.[43] The issue of states' rights was key to Printz's assertions.

The district court ordered judgment in favor of Sheriff Printz.[44] The court declared the provisions of the Act mandating CLEOs to perform background checks unconstitutional and permanently enjoined the government from enforcing those provisions.[45] Furthermore, the court severed the unconstitutional provisions from the remainder of the Act, leaving in place the CLEO's ability to voluntarily undertake background checks of prospective handgun purchasers.[46] In both cases, all of the parties appealed.[47] The separate cases were consolidated into one appeal and heard by the United States Court of Appeals for the Ninth Circuit.[48] The sheriffs' focus on appeal was similar: that each district court's decision regarding the severability of the voluntary check provision of the Act was improper.[49] The government appealed the district courts' findings, alleging that the courts erred in holding that the disputed provisions were unconstitutional.[50] The Ninth Circuit framed the issue as follows: "No one in this case questions the fact that regulation of the sales of handguns lies within the broad commerce power of Congress. The issue for decision is whether the manner in which Congress has chosen to regulate in the Brady Act violates the Tenth Amendment."[51]

The Ninth Circuit analyzed the case through the Tenth and Thirteenth Amendment challenges advocated by both Printz and Mack and through the Fifth

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39. *Id.* at 1509.

40. *Id.* at 1511. The Act required that the CLEOs must

> make a reasonable effort to ascertain within [five] business days whether receipt or possession [of a firearm] would be in violation of the law, including research in whatever State and local recordkeeping systems are available . . . . [If the purchase would not violate the law,] the officer shall . . . destroy the statement . . . . If a [CLEO] determines that an individual is ineligible . . . and the individual requests . . . the officer shall provide such reasons . . .

why the purchase request was denied. *Id.* (quoting 18 U.S.C. § 922(s)(2)-(6)(C)).

41. *Id.* at 1512.

42. *Id.*

43. *Id.* The court held that the provision of the Act that required the CLEOs to perform background checks "substantially commandeered state executive officers and indirectly commandeered the legislative processes of the states to administer a federal program. Accordingly, the court conclude[d] that Congress . . . exceeded [its] powers . . . and violated the Tenth Amendment." *Id.* at 1519.

44. *Id.* at 1519-20.

45. *Id.* at 1520.

46. *Id.*

47. Mack v. United States, 66 F.3d 1025, 1028 (9th Cir. 1995).

48. *Id.* at 1025.

49. *Id.* at 1028.

50. *Id.*

51. *Id.*

Amendment claim that the CLEOs were subject to criminal sanctions for failure to comply with the Act.[52] The court of appeals declined to rule on the Fifth Amendment challenge, however, stating that until such time as the sheriffs were prosecuted under the Act, the Fifth Amendment issue was not ripe.[53]

The court of appeals reversed the district courts' holding that the "Brady Act violate[d] neither the Tenth nor Thirteenth Amendment. Mack and Printz's Fifth Amendment vagueness challenge . . . [was] not ripe."[54]

The Supreme Court granted certiorari and clarified the issue as "whether certain interim provisions of the Brady . . . Act . . . commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate[d] the Constitution."[55] The Court examined the issue using three different modes of analysis: historical understanding, constitutional construction (or textual analysis), and jurisprudence of the Court.[56]

Justice Scalia delivered the opinion of the Court.[57] He stated simply that "Congress cannot circumvent . . . [the] prohibition [against forcing states to enforce a federal regulatory program] by conscripting the State's officers directly."[58] He continued, holding that the federal government cannot command state officers and officials to carry out a federal regulatory program because such commands were "fundamentally incompatible with our constitutional system of dual sovereignty."[59] The Ninth Circuit, therefore, was reversed.[60] Chief Justice Rehnquist, as well as Justices O'Connor, Kennedy, and Thomas concurred, with Justices O'Connor and Thomas each delivering separate concurring opinions.[61] Justice Stevens filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined.[62] Justice Souter filed a separate dissenting opinion as did Justice Breyer (who was joined by Justice Stevens).[63]

III. BACKGROUND AND HISTORY OF THE LAW

The "Gun Control Act of 1968 (GCA), 18 U.S.C. Section 921 *et seq.*, establishe[d] a detailed federal scheme governing the distribution of firearms."[64] The GCA provided a detailed list of persons who were ineligible to purchase or possess a firearm.[65] Many years later, following the attempted assassination of President Ronald Reagan and the wounding of James Brady, Congress amended the GCA in an attempt to provide more security in the area of purchasing handguns.[66] The

52. *Id.* at 1028, 1033-34.
53. *Id.* at 1033.
54. *Id.* at 1034.
55. Printz v. United States, 521 U.S. 898, 902 (1997).
56. *Id.* at 905.
57. *Id.* at 902.
58. *Id.* at 935.
59. *Id.*
60. *Id.*
61. *Id.* at 898.
62. *Id.*
63. *Id.*
64. *Id.* at 902.
65. *Id.*
66. *Id.*

Brady Act "require[d] the Attorney General to establish a national instant background check system . . . ."[67] Until that system was established, however, certain interim provisions were enacted to perform the investigatory function of the soon-to-be-created national agency.[68] One of those interim provisions required CLEOs to "make a reasonable effort to ascertain within [five] business days whether receipt or possession [of a firearm] would be in violation of the law . . . ."[69] This requirement seemed to force CLEOs into implementing a federal regulation, thus violating the Constitution's protection of the division of powers.

A. Federalism

There are a multitude of cases addressing the issue of federalism and the relationship between the federal government—whether the legislative or the executive branches—and the state governments. These cases shed light on the "balance of power" regarding the issue of federalism and states' rights. The Constitution specifically states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."[70]

1. *Environmental Protection Agency v. Brown*

Environmental Protection Agency v. Brown[71] arose because of controversy over a regulation promulgated by the Environmental Protection Agency ("EPA") under the Clean Air Act ("CAA").[72] The Supreme Court granted certiorari after various courts of appeals rendered conflicting decisions as to the constitutionality of certain provisions of the CAA.[73] The Court summarized the issue as whether the EPA Administrator had the authority "to compel various types of implementation and enforcement actions . . . [on] the States."[74]

The provisions under scrutiny were those requiring the states to prescribe automobile emissions testing, to develop and monitor retrofit programs, and to designate preferential bus and carpool lanes in an effort to reduce overall air pollution.[75] The states were forced to develop some form of plan to comply with the statutory mandates.[76] The most controversial provision in the program was 42 U.S.C. § 113(a)(1)(B), which allowed the EPA Administrator to bring a civil action against any state that was non-compliant with the statute.[77]

The constitutionality of these provisions was challenged, and the "United States Courts of Appeals for the Ninth, Fourth, and District of Columbia Circuits struck them down. All of the courts rested on statutory interpretation, but noted

67. *Id.*
68. *Id.*
69. 18 U.S.C. § 922(s)(2) (1994).
70. U.S. CONST. amend. X.
71. 431 U.S. 99 (1977).
72. *Id.*
73. *Id.* at 100.
74. *Id.*
75. *Id.* at 101.
76. *Id.*
77. *Id.* at 102.

also that serious constitutional questions might be raised if the statute were read as the United States argued it should be."[78]

Many strange occurrences took place when the case reached the Supreme Court. The government re-evaluated its original position by first stating that Congress was considering repealing the required bus purchasing provision of the CAA (one of the offending provisions);[79] therefore, that specific issue was removed from consideration by the Court.[80] Second, and more importantly, "the federal parties . . . [did not] merely renounce[ ] an intent to pursue certain specified regulations; they . . . admit[ted] that those [provisions] remaining in controversy [were] invalid unless modified in certain respects."[81]

By changing its original position, the government essentially emasculated its appeal. The Court refused to "pass upon the EPA regulations" for fear that doing so would be "an advisory opinion."[82] The Court simply vacated the decisions of the various courts of appeals and remanded the case on questions of mootness.[83]

For federalism issues, this case is important for one reason. It illustrates the idea that Congress will pass legislation knowing it violates its constitutional authority.

2. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*

In *Hodel*,[84] the Supreme Court was asked to determine the constitutionality of certain provisions of the Surface Mining Control and Reclamation Act ("Surface Act"). The United States District Court for the Western District of Virginia declared several central provisions of the Surface Act unconstitutional and permanently enjoined their enforcement.[85] The Court framed the issue, relating to federalism, as whether or not Congress surpassed Fifth and Tenth Amendment limitations on congressional power when it enacted the Surface Act.[86] The Supreme Court concluded that the Surface Act was constitutional.[87]

The controversial provision, (section 501, 30 U.S.C. § 1251), "establishe[d] a two-stage program for the regulation of surface mining: an initial, or interim regulatory phase, and a subsequent, permanent phase."[88] Under the interim stage, the Department of Interior was to establish an inspection and enforcement program to be implemented in each state.[89] States subject to the federal standards were allowed to issue their own permits and conduct their own inspections and enforcement programs.[90] Further, each state had the option of voluntarily

78. *Id.* (citations omitted).
79. *Id.* at 103.
80. *Id.*
81. *Id.*
82. *Id.* at 103-04.
83. *Id.* at 104.
84. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).
85. *Id.* at 268.
86. *Id.*
87. *Id.*
88. *Id.* at 269.
89. *Id.* at 270.
90. *Id.*

establishing its own program instead of relying exclusively on the Department of Interior's program.[91] "The States . . . [were] not, however, required to enforce the interim regulatory standards [as established by the Department of Interior] and, until the permanent phase of the program, the Secretary . . . [was not permitted to] cede the Federal Government's independent enforcement role to States that wish[ed] to conduct their own regulatory programs."[92] The states were permitted to undertake a participatory role in the regulations. This dual participation is known as cooperative federalism.

Indeed, the Supreme Court reasoned that the "Surface Mining Act establishe[d] a program of cooperative federalism that allow[ed] the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs . . . ."[93] The rationale behind the Court's decision was simple. These provisions allowed for voluntary state participation in the program; thus, Congress did not force the states to legislate according to its dictates. Rather, the Surface Act, according to the Court's reasoning, made use of the concept of dual sovereignty and cooperative federalism. The states and the federal government could establish regulation plans, each independent of the other.

3. *Federal Energy Regulatory Commission v. Mississippi*

The Federal Energy Regulatory Commission ("FERC") controversy[94] arose over certain provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA").[95] Mississippi believed that PURPA violated the Tenth Amendment.[96] PURPA had three primary goals: to conserve energy, to optimize the efficiency of the plant facilities, and to "encourage" fair rates.[97] "To achieve these goals, Titles I and III [of PURPA] direct[ed] state utility regulatory commissions and nonregulated utilities to 'consider' the adoption and implementation of specific 'rate design' and regulatory standards."[98]

PURPA was drafted in a peculiar fashion. Much of the statutory language phrased requirements as something that the states were to "consider."[99] PURPA required the states to consider implementing reporting requirements, rate schedules, and standards relating to electrical service.[100] Nothing in the Act was completely mandatory, and despite "the extent and detail of the . . . proposals[,] . . . no state authority or non-regulated utility [was] required to adopt or implement the specified rate design or regulatory standards."[101]

91. *Id.*
92. *Id.* at 271.
93. *Id.* at 289.
94. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982).
95. *Id.* at 742.
96. *Id.* at 752.
97. *Id.* at 746.
98. *Id.*
99. *Id.* at 746, 749-50.
100. *Id.* at 747, 749.
101. *Id.* at 749-50.

PURPA added more language that lessened any burden on the states. Congress recognized that a state's compliance with the requirements of PURPA would involve the expenditure of funds. Accordingly, it authorized the Secretary of Energy to make grants to state regulatory authorities to assist them in carrying out the provisions of Titles I and II.[102]

The district court held that Congress had exceeded its power when it enacted PURPA.[103] The court concluded that PURPA violated the Commerce Clause and, in federalism terms, that PURPA "trenche[d] on state sovereignty."[104] The FERC and the Secretary of Energy appealed.[105]

The key analysis in *FERC*, for questions of federalism, was the Supreme Court's Tenth Amendment analysis. The Court admitted that through PURPA, "the Federal Government attempt[ed] to use state regulatory machinery to advance federal goals."[106] The Court divided its analysis by PURPA's three requirements.

According to the Court, the first requirement, state enforcement of federal standards, "d[id] nothing more than pre-empt conflicting state enactments in the traditional way."[107] The power of the federal government to pre-empt certain fields is an old and well-established principle.[108] Under this first requirement, the utilities were to "purchase electricity from, and . . . sell it to . . . small power production facilities."[109] The Court implied that this was not an onerous burden.[110] According to *FERC*, the states could have fulfilled this requirement simply by "undertaking to resolve disputes between qualifying facilities and electric utilities . . . ."[111] The Court stated that Mississippi, as well as other states, normally and routinely engaged in this form of administration and dispute resolution.[112]

The second requirement under PURPA was "[m]andatory [c]onsideration of [s]tandards."[113] Although under traditional theories of state sovereignty the federal government is not able to force the state legislatures to vote or implement federal policy, courts will sometimes uphold federal statutes that direct the legislatures "to take or to refrain from taking certain actions."[114] The Court listed numerous examples to support this contention, and concluded that under that jurisprudence, the "Federal Government has some power to enlist a branch of state government . . . to further federal ends."[115]

The Supreme Court's final conclusion was that PURPA was a constitutional expression of congressional power.[116] The Court quickly noted that Congress

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102. *Id.* at 751.
103. *Id.* at 752.
104. *Id.* at 753.
105. *Id.*
106. *Id.* at 759.
107. *Id.*
108. *See*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 286 (1981).
109. *FERC*, 456 U.S. at 759-60.
110. *Id.* at 760.
111. *Id.* (citing 18 C.F.R. § 292.401(a) (1980)).
112. *Id.*
113. *Id.* at 761.
114. *Id.* at 762.
115. *Id.*
116. *Id.* at 771.

could have simply pre-empted the utilities field.[117] Instead, Congress gave the states an opportunity to participate, following the theory of cooperative federalism in regulating the energy producers.[118] Congress' only requirement for allowing state participation was that the states had to consider the suggested standards established by the government.[119] Based on this reasoning, the Court reversed the case.[120]

4. *Garcia v. San Antonio Metropolitan Transit Authority*

Garcia v. San Antonio Metropolitan Transit Authority[121] focused on the procedures of federal government action as a form of protection of state sovereignty, rather than placing reliance on substantive law for protection.[122] The Court in this case (as it had in other cases) took a different view of Tenth Amendment restrictions and their relationship to states' power and sovereignty.[123]

In *Garcia*, a "federal district court concluded that municipal ownership and operation of a mass-transit system [was] a traditional governmental function and thus . . . [was] exempt from the obligations imposed by the [Fair Labor Standards Act ("FLSA")]."[124] The Supreme Court analyzed the issue of whether the San Antonio Mass Transit Authority ("SAMTA"), as a government entity, was subject to the "minimum-wage and overtime requirements of the FLSA."[125] SAMTA sued the Secretary of Labor claiming that the FLSA did not apply to it.[126] Garcia, a SAMTA employee, brought an action (along with other SAMTA employees) against SAMTA for "overtime pay [allegedly due] under the FLSA."[127] Garcia's suit was stayed pending the outcome of the first suit filed by SAMTA.[128] Garcia was allowed, however, to intervene as a defendant with the Secretary of Labor.[129]

The district court, in granting SAMTA's motion for summary judgment, utilized the "traditional" test of whether SAMTA was a function of local government.[130] The Secretary and Garcia appealed directly to the Supreme Court under a statutory grant of authority.[131] The Court vacated the district court's judgment and remanded the case for further consideration in light of a recent Supreme Court decision in a similar type of case.[132] On remand, the district court again entered judgment for SAMTA,[133] reasoning that the state "had engaged in a long-

117. *Id.* at 769.
118. *Id.*
119. *Id.*
120. *Id.* at 771.
121. 469 U.S. 528 (1985).
122. *Id.* at 552.
123. *Id.* at 548-49.
124. *Id.* at 530.
125. *Id.* at 533.
126. *Id.* at 534.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 535.
131. *Id.*
132. *Id.* (referring to Transportation Union v. Long Island R.R., 455 U.S. 678 (1982)).
133. *Id.*

standing pattern of public regulation, and that this regulatory tradition gave rise to an 'inference of sovereignty.'"[134]

The Secretary of Labor and Garcia appealed again.[135] On this appeal, the Court requested that the parties consider a different issue: whether "or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*[136] . . . should be reconsidered[.]"[137]

a. *National League* Test

National League of Cities v. Usery outlined four conditions to be met before a "state activity [could] be deemed immune from a particular federal regulation under the Commerce Clause."[138] First, the states had to be regulated as states.[139] Second, the statute "must 'address matters that are . . . attribute[s] of state sovereignty.'"[140] Third, the regulation must interfere with the state's ability to legislate in areas traditionally controlled by state legislation.[141] And finally, "the relation of state and federal interests must not be such that 'the nature of the federal interest . . . justifies state submission.'"[142] According to the Court, the third condition caused the controversy in the case.[143]

b. Application of the *National League* Test to *Garcia*

The Court's analysis in *Garcia* focused on the third condition of the *National League* test, concluding that it was not a sound mode of analysis of government functions.[144] The majority found that the historical function test (test three) resulted in "line-drawing of the most arbitrary sort . . . ."[145] Based on this statement, the Court rejected "as unsound in principle and unworkable in practice, a rule of state immunity . . . that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"[146] The Court chose a different "test" altogether, one that focused on procedural rather than substantive aspects of law.[147]

The Supreme Court's new test was derived from the Tenth Amendment. The Court held that the Tenth Amendment limited the power of the states, not the power of the federal government.[148] The Tenth Amendment, as viewed by the

134. *Id.* (citation omitted).
135. *Id.* at 536.
136. 426 U.S. 833 (1976).
137. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537 (1985) (citation omitted). *National League of Cities v. Usery*, which addressed the principles of the Tenth Amendment and states' rights, was overruled by *Garcia*.
138. *Garcia*, 469 U.S. at 537.
139. *Id.*
140. *Id.* (citation omitted).
141. *Id.*
142. *Id.*
143. *Id.* at 538.
144. *Id.* at 543-44.
145. *Id.* at 544.
146. *Id.* at 546-47.
147. *Id.* at 557.
148. *Id.* at 548.

Court, contracted the power and sovereignty of the states by withdrawing many powers from the states as a whole.[149] "Section 8 of . . . Article [I] work[ed] an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation."[150]

According to the Court, the safeguards of state sovereignty did not necessarily come from the Tenth Amendment. Instead, they came from the structure of the federal government itself.[151] "It [was] no novelty to observe that the composition of the Federal Government was designed . . . to protect the States from overreaching by Congress."[152] Procedural safeguards were instituted by the Framers to protect the states; these safeguards were better as a means of protecting the states than the "judicially created limitation on federal power" that would result from using the Tenth Amendment only to limit federal power.[153] The Court's message of process over substance was clear. As a result, the FLSA's wage requirements could apply to SAMTA employees without violating state sovereignty.

5. *New York v. United States*

New York v. United States[154] was another case that dealt with federal regulation and perceived violations of state sovereignty.[155] At the heart of *New York* were various provisions of the Low-level Radioactive Waste Policy Amendments Act of 1985 ("LRWPA") that the State of New York believed to be unconstitutional on several grounds.[156] At the beginning of the opinion, Justice O'Connor explicitly stated that "the Constitution does not confer upon Congress the ability simply to compel" the states to regulate according to federal dictates.[157]

The LRWPA mandated the states, either in their individual capacities or in regional compacts with other states, to dispose of the low-level radioactive waste generated in each respective state.[158] The states (either individually or in regional compacts) were to allow non-sited states to dispose of the waste in the sited states (the sites were to remain available for seven years).[159] During that time, the sited states could place a surcharge on the waste brought to the disposal sites from the non-sited states.[160] After seven years, the sited states could exclude outside-generated waste from their disposal sites.[161]

149. *Id.*
150. *Id.*
151. *Id.* at 550.
152. *Id.* at 550-51.
153. *Id.* at 552.
154. 505 U.S. 144 (1992).
155. *Id.* at 149.
156. *Id.* at 144.
157. *Id.* at 149.
158. *Id.* at 151 (quoting 42 U.S.C. § 2021c(a)(1)(A) (Supp. V 1981)).
159. *Id.* at 152.
160. *Id.* (quoting 42 U.S.C. § 2021e(d)(1) (Supp. V 1981)).
161. *Id.* (quoting 42 U.S.C. § 2021d(c) (Supp. V 1981)).

The LRWPA provided three types of incentives: monetary incentives, access to the waste sites, and a take title provision.[162] The monetary incentives stated that one-fourth of any surcharge collected from the non-sited generators was to be held in escrow by the Secretary of Energy.[163] A January 1993 deadline was set under which each state was to either have joined a regional compact or instituted its own disposal facility.[164] "Each State that ha[d] not met the 1993 deadline [had] either [to] take title to the waste generated within its borders or forfeit to the waste generators the incentive payments it ha[d] received."[165]

The second incentive, the access incentive, built onto the first incentive the added risk of increased cost to gain access to dispose of low-level waste.[166] The states that failed to meet the established deadlines for fulfilling certain criteria were subject to incremental increases in the allowable surcharge (charged by the sited-states) for access to the sited-states' disposal facility.[167]

The take title provision was the third and most severe provision.[168] Basically, this "incentive" dictated that if a state which produced low-level radioactive waste had not entered into a regional compact or could not dispose of its waste otherwise, that state "shall take title to the waste, be obligated to take possession of the waste, and . . . be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste . . . ."[169]

These three provisions were the basis of New York's suit against the United States. New York originally sought a declaratory judgment that "the [LRWPA was] inconsistent with the Tenth and Eleventh Amendments . . ., with the Due Process Clause of the Fifth Amendment, and with the Guarantee Clause of Article VI of the Constitution."[170] The district court dismissed the complaint, and on appeal New York modified its complaint to allege only that the LRWPA violated the Tenth Amendment and the Guarantee Clause.[171]

Justice O'Connor's opinion listed two ways to analyze Tenth Amendment challenges.[172] The first mode of analysis was an inquiry by the Court into "whether an Act of Congress [was] authorized by one of the powers delegated to Congress in Article I of the Constitution."[173] The second mode of analysis was questioning whether the act "invade[d] the province of State sovereignty reserved by the Tenth Amendment."[174] Sometimes, however, as in *New York*, the "two inquiries are mirror images of each other."[175]

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162. *Id.* at 152-53.
163. *Id.* at 152.
164. *Id.* at 152-53.
165. *Id.* at 153.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 153-54.
170. *Id.* at 154.
171. *Id.*
172. *Id.* at 155.
173. *Id.*
174. *Id.*
175. *Id.* at 156.

According to the Court, the issue in *New York* was to determine how Congress could "use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way."[176] New York agreed that Congress had the power to simply pre-empt the field; the state's challenge was based upon the manner in which the government tried to force the states to regulate the disposal of low-level radioactive waste.[177] New York viewed the LRWPA as a direct requirement that the state regulate according to congressional desire.[178]

Justice O'Connor was quick to note that "[a]s an initial matter, Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[179] There are, however, Court-sanctioned methods that Congress may use to persuade states to act in certain ways. "First, under Congress' spending power, 'Congress may attach conditions on the receipt of federal funds . . .'" and second, under the power of the Commerce Clause, the theory of cooperative federalism is a possible course of action.[180] Cooperative federalism permits the states to either participate by regulating the activity according to federal standards or allow the federal government to pre-empt the field.[181] Either of these two methods is acceptable to the Court.

Important considerations weigh in the balance when claiming that either method is acceptable. First, the people of the state maintain the final authority in deciding whether the state will regulate, or if it will allow the federal government to step in and pre-empt the field.[182] The second concern is the issue of accountability.[183] When the "Federal Government compels the States to regulate, the accountability of both state and federal officials is diminished."[184]

The Court found the first two of the three provisions in question to be constitutionally adequate.[185] "The take title provision [was, however,] of a different character . . . . In this provision Congress . . . crossed the line distinguishing encouragement from coercion."[186] The government listed three times when this type of action is acceptable. The first is when the "federal interest is sufficiently important to justify state submission."[187] The Court's response was that no "matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the states to regulate."[188] Congress may, however, utilize cooperative federalism to ensure state action, or Congress may preempt the field.[189]

176. *Id.* at 161.
177. *Id.* at 160.
178. *Id.* at 169.
179. *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).
180. *Id.* at 167.
181. *Id.*
182. *Id.* at 168.
183. *Id.*
184. *Id.*
185. *Id.* at 173-74.
186. *Id.* at 174-75.
187. *Id.* at 177.
188. *Id.* at 178.
189. *Id.*

The government's second argument was that, in limited circumstances, the Constitution permits "federal directives to state governments."[190] The government listed several cases that dealt with the Supremacy Clause.[191] The Court's response was that all of the government's cases involved "congressional regulation of individuals, not congressional requirements that States regulate."[192]

The government's third and final argument was that the "Constitution envision[ed] a role for Congress as an arbiter of interstate disputes."[193] The Court acknowledged that the Framers may have indeed envisioned Congress assuming the role of arbiter, but the Court did not believe that the Framers meant for Congress to undertake that role by "mandating state regulation."[194]

The Court's conclusion was clear: the "Federal Government may not compel the States to enact or administer a federal regulatory program."[195] Congress may, however, ensure state action by controlling the purse strings or by undertaking the use of cooperative federalism.

B. Federalism and the Brady Act

A number of cases were litigated that combined issues of federalism as "defined" by the Supreme Court and the enactment of the Brady Act. These cases were factually similar in nature to the main case in this Note, *Printz v. United States*. Each case was brought by a sheriff or CLEO who claimed that the Act was unconstitutional. These cases include *McGee v. United States*,[196] *Frank v. United States*,[197] and *Koog v. United States*.[198] Two cases were decided in a similar manner to the lower court's decision in the Topic Case. The third, however, was not.

1. *McGee v. United States*

In *McGee*,[199] the plaintiff, a sheriff in Forrest County, Mississippi, challenged the provisions of the Brady Act that required him to perform the mandatory background checks on prospective handgun purchasers.[200] Specifically, Sheriff McGee sought "a declaratory judgment that the Brady Handgun Violence Prevention Act . . . [was] unconstitutional and . . . a permanent injunction prohibiting the Defendant's enforcement thereof."[201] McGee claimed that the Act commandeered state officers into executing federal policy in violation of the

190. *Id.*
191. *Id. See also*, Palmore v. United States, 411 U.S. 389 (1973); Testa v. Katt, 330 U.S. 386 (1947).
192. *New York*, 505 U.S. at 179.
193. *Id.* at 180.
194. *Id.*
195. *Id.* at 188.
196. McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994).
197. Frank v. United States, 78 F.3d 815 (2d Cir. 1996).
198. Koog v. United States, 79 F.3d 452 (5th Cir. 1996).
199. *McGee*, 863 F. Supp. at 321.
200. *Id.* at 323.
201. *Id.*

Tenth Amendment.[202] Sheriff McGee, like Sheriffs Printz and Mack, alleged that the criminal sanctions provision was unconstitutionally vague in light of the Fifth Amendment.[203]

The United States District Court for the Southern District of Mississippi agreed that McGee had standing to challenge on the first claim, but held that he did not have standing to bring his Fifth Amendment challenge, as he was "not under any danger of criminal prosecution regardless of whether he [did] or [did] not make the required background check . . . ."[204]

The district court was "mindful" that the Supreme Court had, in previous instances, tacitly approved legislation similar to the Brady Act that made use of cooperative federalism.[205] The trial court, however, examined the language of the Act and found that it did not make use of the cooperative federalism theory.[206] "Congress, in the Brady Bill, did not give local sheriffs the option of cooperating with federal officials."[207] Based on this reasoning, the district court stated that Congress could not compel state officials to implement federal policy.[208]

2. *Koog v. United States*

Koog[209] involved the same type of challenge made by Sheriff McGee. Koog was the sheriff of Val Verde County, Texas.[210] Koog filed suit "seeking a declaration that [the Brady Act] violated the Tenth and Fifth Amendments to the United States Constitution and seeking injunctive relief against enforcement of that section."[211] Koog based his challenge to the Act upon the same theory argued by McGee, Printz, and Mack, the theory that Congress cannot compel state officers to execute federal policy.[212]

The United States District Court for the Western District of Texas found Koog to have standing to bring the Tenth Amendment challenge, but did not find standing for his Fifth Amendment challenge.[213] The district court concluded that "Sheriff Koog's constitutional challenge to the Brady Act must fail."[214] The court acknowledged that Koog did have standing, to a limited degree, but failed to see how the Act violated the Tenth Amendment.[215] Additionally, the court did not believe that the Act commandeered state officials.[216]

The government (in the *McGee* case) and Sheriff Koog appealed their cases to the Fifth Circuit.[217] The appeals were consolidated, and the court considered both

202. *Id.* at 324.
203. *Id.*
204. *Id.*
205. *Id.* at 325.
206. *Id.* at 326.
207. *Id.*
208. *Id.* at 327.
209. Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994).
210. *Id.* at 1377-78.
211. *Id.*
212. *Id.*
213. *Id.* at 1380-81, 1388.
214. *Id.* at 1389.
215. *Id.* at 1380-81, 1388.
216. *Id.* at 1389.
217. Koog v. United States, 79 F.3d 452, 454 (5th Cir. 1996).

sides of the argument. "On appeal, the sheriffs argue[d] that the interim provisions of the Act violate[d] the Tenth Amendment by compelling them to administer the Brady Act . . . ."[218] The government, on appeal, argued that under the theory of cooperative federalism, the Act should survive a constitutional attack.[219]

The Fifth Circuit examined the Tenth Amendment in great detail to see if the interim provision encroached on state sovereignty.[220] The Fifth Circuit found that it did: "The Brady Act imposes new federally-prescribed, non-discretionary tasks on actors, the CLEOs, . . . without the consent or participation of the States."[221]

3. *Frank v. United States*

The Fifth Circuit's decision and rationale was opposed to the Second Circuit's ruling on this issue.[222] Frank, a sheriff in Vermont, brought a challenge against the Brady Act that was similar in scope to the other sheriffs' claims.[223] He claimed that the Act violated the Tenth Amendment.[224] Frank appealed to the Second Circuit after the district court ruled "that he lacked standing to challenge [the Brady Act] on Fifth Amendment grounds and that the background check provision [was] severable from the remainder of the Act."[225]

The Second Circuit, like the other courts, first checked to see if Frank had standing. It concluded that he did, in fact, have standing to challenge the Act, but only on the Tenth Amendment grounds.[226] The court's analysis of the Tenth Amendment was similar to all of the other courts' analyses. The Second Circuit, however, reached an opposite conclusion, finding that the Act did not violate the Tenth Amendment.[227] The Second Circuit reversed the district court's holding that the Act was unconstitutional.[228] Following the Second Circuit's holding, Frank appealed to the Supreme Court, which vacated the judgment and remanded the case "to the United States Court of Appeals for the Second Circuit for further consideration in light of *Printz*."[229]

The circuit courts of appeals were split over the constitutionality of the Brady Act's mandatory background check provisions. This split of opinion set the stage for the Supreme Court to review the Act in the *Printz* case.

C. The Brady Act

The Brady Act is codified in the various portions of 18 U.S.C. § 922. The Act required the performance of various duties by different individuals and agencies

218. *Id.*
219. *Id.*
220. *Id.* at 457.
221. *Id.* at 463.
222. *See*, Frank v. United States, 78 F.3d 815 (2d. Cir. 1996).
223. *Id.* at 821.
224. *Id.* at 819.
225. *Id.*
226. *Id.* at 822, 825.
227. *Id.* at 834.
228. *Id.*
229. Frank v. United States, 521 U.S. 1114 (1997).

when a request for a handgun purchase was made. Section 922(s)(2) placed a burden on the CLEO to make a reasonable background check of any prospective firearms purchaser.[230] The prospective purchaser must complete a "Brady Form," which is then given to the CLEO.[231] The purpose of this requirement was to ensure that the purchaser was not a member of a restricted class, as defined in section 922(s)(3)(B)(i)-(vii).[232] Section 922(s)(6)(B) states that "[u]nless the [CLEO] to whom a statement is transmitted . . . determines that a transaction would violate Federal, State or local law . . .," he is to destroy the statement within twenty days.[233]

IV. INSTANT CASE

The Supreme Court granted certiorari to Printz and Mack following their consolidated appeal to the Ninth Circuit.[234] The district courts (both in Arizona and Montana) ruled that the provision of the Brady Act, 18 U.S.C. § 922(s)(2), which required all CLEOs to perform a background check of potential handgun purchasers, was unconstitutional.[235] The district courts also held that this provision was severable from the rest of the Act, thereby leaving the majority of the Act intact.[236] The Ninth Circuit, however, "reversed, finding none of the Brady Act's interim provisions to be unconstitutional."[237]

Justice Scalia delivered the opinion of the Court and was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas.[238] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, filed a dissenting opinion.[239] Justices O'Connor and Thomas each filed a concurring opinion, while Justice Breyer filed a separate dissenting opinion in which Justice Stevens joined.[240]

A. Justice Scalia's Majority Opinion

Justice Scalia immediately phrased the issue as "whether certain interim provisions of the [Brady Act], commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate[d] the Constitution."[241] The Act, which amended the Gun Control Act ("GCA") of 1968, called for certain interim provisions to

230. 18 U.S.C. § 922(s)(2) (1994).
231. 18 U.S.C. § 922(s)(1)(A)(i)(III) (1994).
232. 18 U.S.C. § 922(s)(3)(B)(i)-(vii) (1994). The listed class includes those who are not convicted felons or have been convicted of domestic abuse; are not a fugitive; are not addicted to drugs or any controlled substance; are not insane; are not an illegal or unlawful alien; have not been dishonorably discharged from the military; or, a person who has renounced his United States citizenship.
233. 18 U.S.C. § 922(s)(6)(B) (1994).
234. Printz v. United States, 521 U.S. 898 (1997).
235. *Id* at 904.
236. *Id.*
237. *Id.*
238. *Id.* at 900.
239. *Id.* at 900-01.
240. *Id.* at 900.
241. *Id.* at 901.

be implemented until the "national instant background check system" required by the Act could be established.[242] Three interim duties were designated by the Act, only one of which was really at issue.

Under the interim provisions, a gun dealer, prior to making a sale of a handgun must

> (1) [r]eceive from the transferee a statement (the Brady Form) . . . containing the name, address and date of birth of the proposed transferee along with a sworn statement that the transferee is not among any of the classes of prohibited purchasers . . .; (2) verify the identity of the transferee by examining an identification document . . .; and (3) provide the "chief law enforcement officer" (CLEO) of the transferee's residence with notice of the contents . . . of the Brady Form . . . .[243]

The third provision was the controversial one: when the CLEO received the Brady Statement, he was required to "make a reasonable effort to ascertain . . . whether receipt or possession would be in violation of the law . . . ."[244] This determination was made by researching the prospective purchaser's background in whatever research resources were available.[245]

Following the initial determination, if the CLEO decided that a sale would be in violation of the law, "he must, upon request, provide the would-be-purchaser with a written statement of the reasons for that determination."[246] The CLEO must then destroy any documents that he had pertaining to a proposed transfer of a weapon.[247]

Based on the duties required by the Brady Act, Scalia surmised that the Act essentially impressed state officers into the service of the federal government.[248] The analysis of this issue (whether the Act did in fact "impress" state officers, contrary to the division of powers established in the Constitution) was divided into three topic areas: (1) an historical understanding, (2) the structure of the Constitution (textualism), and (3) the jurisprudence of the Court.[249]

1. Historical Understanding

The "Petitioners contend[ed] that compelled enlistment of state executive officers for the administration of federal programs [was] . . . unprecedented."[250] The government took the opposite view and offered "proof" that Congress has always enacted statutes that required state officers to implement federal regulatory programs.[251] "The government [offered by way of example] that statutes enacted by the first Congresses required state courts to record applications for

242. *Id.*; 18 U.S.C. § 921 (1968).
243. *Printz*, 521 U.S. at 903.
244. *Id.* (quoting 18 U.S.C. § 922(s)(2) (1994)).
245. *Id.*
246. *Id.*
247. *Id.* at 904.
248. *Id.*
249. *Id.* at 905.
250. *Id.*
251. *Id.*

citizenship, . . . to transmit abstracts of citizenship applications and other naturalization records . . . and to register aliens seeking naturalization and issue certificates of registry . . . ."[252] Justice Scalia countered this argument, stating that these laws were designed to be an obligation on state judges "to enforce federal prescriptions . . . related to matters appropriate for the judicial power."[253] Scalia did not believe this argument was persuasive enough to justify the "supposed" power of Congress to impress state officials.[254]

Justice Scalia relied on portions of *The Federalist Papers* in an attempt to glean what the Framers might have intended when they wrote the Constitution and to possibly shed light on the historical understanding of the Constitution.[255] The government used various letters from *The Federalist* to support its position of utilizing state officials to implement the Act.[256] The government quoted Hamilton when urging that the Constitution "would 'enable the [national] government to employ the ordinary magistracy of each [state] in the execution of its laws.'"[257] Madison's statement that when needed for the "organization of the judicial power, the officers of the States will be clothed in the . . . authority of the Union" was another argument used by the government to illustrate that the Federalists and the Framers anticipated that state officers would be utilized by the federal government.[258]

Justice Scalia concluded that the government simply missed the point: "[N]one of [the] statements [in *The Federalist*] necessarily implie[d] . . . that Congress could impose [those] responsibilities without the consent of the States. They appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government . . . ."[259] Scalia conceded that all state officers are duty-bound to uphold the United States Constitution, but those officers cannot be forced into participating in a federal regulatory program.[260]

2. Textual Discussion

Justice Scalia's second analysis was based on an understanding of the Constitution's text.[261] This analysis began with the basic assumption that the Constitution created a system of dual sovereignty, and that "[a]lthough the States surrendered many of their powers to the . . . Federal Government, they retained a [degree of] sovereignty."[262]

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252. *Id.* at 905-06 (citations omitted).
253. *Id.* at 907.
254. *Id.*
255. *Id.* at 910.
256. *Id.* at 910-19; THE FEDERALIST NO. 27 (Alexander Hamilton); THE FEDERALIST NOS. 30, 44, 45 (James Madison).
257. *Printz*, 521 U.S. at 910 (citation omitted).
258. *Id.*
259. *Id.*
260. *Id.* at 910-11.
261. *Id.* at 918.
262. *Id.* at 918-19.

In this analysis, as in the historical understanding portion, Scalia relied on the various works in *The Federalist Papers* to shed some light on the intent of the Framers.[263] The use of *The Federalist* led to many conclusions on questions of sovereignty that supported the majority opinion.[264] The Framers feared the tyranny of a strong national government.[265] This fear was the basis for the Federalists' espousing the idea of reliance upon dual sovereignty to reduce the threat of tyranny.[266] As Scalia said, the "power of the Federal Government would be augmented immeasurably if it were able to impress into service . . . the police officers of the [fifty] states."[267]

Justice Scalia's analysis then changed direction and examined various constitutional provisions that supported the majority. First and foremost, the Constitution explicitly states that the Executive Branch is responsible for implementing the laws passed by Congress.[268] This is reflected in Article II, Section 3.[269] "The Brady Act effectively transfers this responsibility to thousands of CLEOs . . . who . . . [must] implement the program without . . . Presidential control . . . ."[270] Scalia continued along this vein of analysis of control and implementation of the law by concluding, on this point, that the power of the President would be unconstitutionally reduced if Congress could pass legislation such as the Brady Act, thus allowing state officials and officers to perform the President's constitutional role in implementing the laws of the United States.[271] The division of power between the two levels of government, he argued, needed to be maintained.[272]

Justice Scalia and the majority agreed with Alexander Hamilton's statement that the people were the "'only proper objects of government.'"[273] In other words, according to Scalia's analysis, "the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people."[274] Following that line of reasoning, Scalia stated that Congress lacked the constitutional authority to directly force the states to act, as it had done in passing the controversial provisions of the Act.[275]

3. Precedent

Justice Scalia's final analysis was precedent.[276] Scalia relied upon several Supreme Court opinions stating that Congress cannot compel the states to imple-

263. *Id.* at 919-20.
264. *Id.* at 920.
265. *Id.* at 922.
266. *Id.* at 920.
267. *Id.* at 922.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* at 920 (citing THE FEDERALIST No. 15 (Alexander Hamilton)).
274. *Id.* at 919-20.
275. *Id.* at 924 (citation omitted).
276. *Id.* at 925.

ment federal regulatory programs, nor can it commandeer state governments.[277] Scalia noted that even when cases revolving around this issue were brought before the circuit courts of appeals, many were "invalidated . . . on statutory grounds in order to avoid . . . [the] . . . grave constitutional issues."[278] When these cases reached the Supreme Court, the government, perhaps sensing that the acts were unconstitutional, would not even defend the challenged statutes.[279] The Court then simply "remanded [them] for consideration of mootness."[280]

One of the government's key defenses was that the Act did not "require state legislative or executive officials to make policy, but instead issue[d] a final directive to state CLEOs."[281] Scalia and the majority disagreed with this argument. Scalia commented that the government's distinction between policy-making and implementation was similar to the "line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation-of-powers purposes."[282] Scalia inferred that if the Act called for policy-making, it would be similar to the delegation of legislative authority to the President, and, therefore, the Act would be unconstitutional.[283]

The question of policy-making versus implementation, by itself, is not conclusive proof of unconstitutionality. The Act, even if classified as merely calling for the implementation of federal law, can still be held unconstitutional if it intrudes upon state sovereignty.[284] In this scenario the states and its officers remain autonomous.[285] To make this point clear, Scalia stated that to hold otherwise would, by an extension of logic, allow one to say that it would be constitutional for officers of the United States to be "impressed into service for the execution of state laws."[286]

The Petitioners put forth the argument that, in forcing state officers to implement the federal regulations, the degree of accountability was shifted between the federal and state governments.[287] This shifting could work both ways and be either advantageous or disadvantageous to either the state or federal government. For example, as the majority stated, by "forcing state governments to absorb the financial burden of implementing a federal regulatory program, . . . Congress can take credit for 'solving' problems" without having to expend federal funds.[288] If, however, the program failed and there was public backlash, Congress could then simply place the blame on the states.[289]

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277. *Id.*
278. *Id.*
279. *Id.* (citation omitted). *See* Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975); Brown v. EPA, 52 F.2d 827 (9th Cir. 1975).
280. *Printz*, 521 U.S. at 925.
281. *Id.* at 926.
282. *Id.* at 927.
283. *Id.*
284. *Id.* at 928.
285. *Id.*
286. *Id.*
287. *Id.* at 930.
288. *Id.*
289. *Id.*

B. Justice O'Connor's Concurrence

Justice O'Connor began by stating that "[o]ur precedent and our Nation's historical practices support the Court's holding."[290] Justice O'Connor added that the CLEOs were free to perform background checks on a voluntary basis.[291]

C. Justice Thomas's Concurrence

Justice Thomas supported the majority opinion's rationale but wrote a separate concurring opinion in order to "emphasize that the Tenth Amendment affirms the undeniable notion that under [the] Constitution, the Federal Government is one of enumerated, hence limited, powers."[292] The federal government simply did not (and does not) have the power to impress state officers.[293]

D. Justice Stevens's Dissent

Justice Stevens began his dissenting opinion with the basic premise that "[w]hen Congress exercise[d] the powers delegated to it by the Constitution, it . . . impose[d] affirmative obligations on executive and judicial officers of state and local governments."[294] He claimed that the Constitution, the history of America, the jurisprudence of the Court, and "a correct understanding of the basic structure of the Federal Government" substantiated this premise.[295] Justice Stevens essentially analyzed the issue in the same manner as Justice Scalia; Justice Stevens, however, came to a different conclusion.

Justice Stevens believed that the Petitioners' argument was not an issue worth concern. According to him, the question presented was similar to other pieces of legislation that Congress had enacted that allowed the impressment of various state officers into federal service.[296] Stevens continued this frame of analysis by citing numerous examples of when, in times of national emergency, Congress utilized state officers to implement federal programs.[297] The draft, air raid wardens, and the "inoculation of children," Stevens reasoned, "may require a national response before federal personnel can . . . respond."[298] According to Justice Stevens, the power to pass legislation similar to the Brady Act existed.

Stevens analogized what Congress declared as an "'epidemic of gun violence'" to a national emergency under which, he argued, Congress clearly had the power to enact the Brady Act.[299] He also claimed that the majority embarked on a policy-making expedition with its decision.[300]

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290. *Id.* at 935.
291. *Id.* at 936.
292. *Id.* (citations omitted).
293. *Id.* at 937.
294. *Id.* at 939.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.* (citation omitted).
300. *Id.* Stevens hinted that this was a problem that would best be handled by the legislative branch, thus pointing toward the political question doctrine.

1. Textual

Justice Stevens made two major points in the area of textual analysis. He first argued that the Tenth Amendment "confirm[ed] the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope . . . of the exercise of powers that are delegated to Congress."[301] His second point was that Federal law was and is "'the supreme law of the land;'"[302] therefore, "there can be no conflict between [the] duties to the State and those owed to the Federal Government."[303]

2. Historical

Justice Scalia, like Stevens, relied upon *The Federalist Papers* to clarify questions of intent of the Framers.[304] One idea pulled from *The Federalist* was that the "Founders intended to enhance the capacity of the federal government by empowering it—as a part of the new authority [as opposed to the Articles of Confederation] to make demands directly on individual citizens—to act through local officials."[305] This statement summarized Stevens's opinion on why the historical nature of the Constitution supported the dissent.

Justice Stevens asserted that the majority did not adequately consider the historical evidence when reaching its conclusion.[306] Stevens pointed out various *Federalist* excerpts that discussed the importance of suborning the state governments to the execution of federal law.[307]

On this topic, Stevens also addressed the difference between straight policy decisions and the need for impressment of state officers during crises.[308] The prime example given by both sides was President Woodrow Wilson's actions during World War I.[309] President Wilson was given by Congress the power to "utilize the services of the state officers in implementing the World War I draft."[310] According to Stevens, this "surely indicates that the national legislature saw no constitutional impediment to the enlistment of state assistance during a federal emergency."[311]

3. Federalism and Jurisprudence of the Court

Essentially, Justice Stevens argued that a separate rule or piece of legislation is not needed to protect state sovereignty; one need only look at the structure of the federal government itself.[312] The case law of the Supreme Court, as viewed by

301. *Id.* at 942.
302. *Id.* at 943 (quoting U.S. CONST. art. VI, cl. 2).
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* at 945.
307. *Id. See,* THE FEDERALIST No. 27 (Alexander Hamilton).
308. *Printz,* 521 U.S. at 952-53.
309. *Id.* at 953.
310. *Id.*
311. *Id.*
312. *Id.* at 956.

Stevens, supported this view. The "composition of the Federal Government was designed . . . to protect the states" from congressional usurpation.[313]

E. Justice Souter's Dissent

Justice Souter agreed with the basic reasoning of Justice Stevens.[314] Quite simply, Souter believed "that the most straight-forward reading of [*Federalist*] No. 27 [was] authority for the Government's position . . . and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45."[315]

Alexander Hamilton, in *The Federalist*, stated that "the Legislatures, Courts and Magistrates of the respective members will be incorporated into the operations of the National Government, as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws."[316] Souter believed that this reading (of No. 27) gave tacit approval for Congress to "incorporate" and make "auxiliary" the state governments.[317]

Federalist No. 44 was also an important basis for Souter's dissenting opinion. He latched onto the idea in No. 44 that the state officers, by oath, were simply agents of the federal Constitution.[318] His reading of No. 44 clearly supported and gave credibility to his interpretation of No. 27. Justice Souter gave examples from the history of the nation to support this agency/auxiliary theory, examples such as state officers acting as tax collectors and the election of senators by the state legislatures.[319]

F. Justice Breyer's Dissent

Justice Breyer's rationale as to why Congress had the power to require CLEO participation was simple: "[T]here is neither need nor reason to find in the Constitution an absolute principle, the inflexibility of which poses a surprising and technical obstacle to the enactment of a law that Congress believed necessary to solve an important national problem."[320]

V. ANALYSIS

Printz made one thing clear: Congress cannot compel the states to implement a "federal regulatory program."[321] To have held otherwise would have blurred the lines between the federal and state governments and would have greatly reduced federalism.

Two cases were primarily relied upon in the principal case: *New York* and *FERC*. The majority spent a great deal of time analogizing *New York* to the principal case while attempting to distinguish the contrary holding in *FERC*.

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313. *Id.* (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985)).
314. *Id.* at 970.
315. *Id.*
316. *Id.* at 971 (citing THE FEDERALIST NO. 27 (Alexander Hamilton)).
317. *Id.*
318. *Id.* (citing THE FEDERALIST NO. 44 (James Madison)).
319. *Id.*
320. *Id.* at 973.
321. *Id.* at 934.

A. Scalia and New York

Justice Scalia placed much emphasis on the Court's analysis in *New York*. The opinion in that case embodied many of the ideals that Scalia thought were pertinent in the principal case: the intent of the Framers to shy away from a national, centralized government; the accountability of both the federal and states' governments; and the general principle that the federal government does not have the power to compel the states to implement a federal scheme.[322]

The government attempted to distinguish *New York* on several different grounds. First, the government urged that *New York* could be distinguished because the unconstitutional take title provision called for states to legislate policy in accordance with the provision.[323] Here, however, as the government urged, "the background-check provision of the Brady Act [did] not require state legislative or executive officials to make policy, but instead issue[d] a final directive to state CLEOs."[324] Essentially, according to the government, if the Act does not call for policy-making, then the fact that states are commandeered is not relevant.[335]

Justice Scalia's answer to this assertion was that the "Government's distinction between 'making law' and merely 'enforcing' it, between 'policymaking' and mere 'implementation,' is an interesting one."[326] What exactly constitutes making policy? Is making a decision as to what constitutes a reasonable effort in making a background check a form of policymaking? Justice Scalia certainly intimated that such an exercise by a CLEO would indeed be considered policymaking.[327] If it were policymaking, then under *New York* it would be automatically invalidated. The government believed that because the Act did not devolve policymaking responsibilities on the CLEOs, the Act was constitutional.

The analysis up to this point still leaves unanswered the issue of whether the Act encroaches on state sovereignty. "Even assuming . . . that the Brady Act leaves no 'policymaking' discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty."[328] Thus, according to the Court's reasoning, the Act will fail a constitutional test regardless of whether a policymaking role is given to the CLEOs.

The government's second argument to distinguish *New York* concerned the issue of governmental accountability.[329] "The Government . . . maintain[ed] that requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate . . . *New York* because it does not diminish the accountability of state or federal officials."[330] Scalia gave two responses to this argument.

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322. *Id.*
323. *Id.* at 926.
324. *Id.*
325. *Id.* at 927.
326. *Id.*
327. *Id.*
328. *Id.* at 928.
329. *Id.* at 929-30.
330. *Id.*

First, "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program," Congress either gets credit for a job well-done or gets to shift the blame to the states if the program fails.[331] Second, in all likelihood, the CLEO would be the official who would bear the brunt of any public ill-will toward the program.[332]

B. Historical

1. Historical Understanding of the Constitution

Justice Scalia noted the government's argument that early acts of Congress almost routinely used state officials to implement federal law.[333] The government listed numerous examples of early congressional enactments that required state officials' participation in implementation.[334] "These early laws establish[ed], at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."[335] The majority, therefore, did not believe that this portion of the government's argument provided any weight to the final disposition of the case.

2. Impact of Holding

The holding of the Court seems to be a victory for states' rights activists; the Court shot down an act that clearly surpassed the power of Congress. Those who support limiting the availability of handguns will be dissatisfied with the decision; after all, according to the Court, if a CLEO does not wish to make a background check before a handgun is purchased, he is not required to do so. The activists will see this ruling as a means for those who should not have possession of a weapon to gain access to one without the fear of the application being rejected by the proper authorities. In the long run, anti-gun activists might argue that the number of violent acts committed with handguns will increase.

Those on both sides of the issue (especially anti-gun activists) need to realize one important point: the Supreme Court simply held that the mandatory background check system was unconstitutional. This portion of the Act was severed from the rest of the Act, including the provisions that a CLEO may still voluntarily undertake background checks on prospective handgun purchasers. Second, and more important, the federal government must establish a national instant background check system.[336] This system will check the background of the potential purchaser without CLEO participation.

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331. *Id.* at 930.
332. *Id.*
333. *Id.* at 905-06.
334. *Id. See,* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103; Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567; Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-55.
335. *Printz,* 521 U.S. at 907.
336. *Id.* at 902. This system was added on November 30, 1998.

The introduction of the national instant background check system is a step in the right direction. This procedure will alleviate the duty, voluntary as it is, of the CLEOs to perform background checks. The national system will still permit the checks to be made, but it will not require the time delay for purchases or impose an onerous burden on those performing the check. Thus, the anti-gun activists and gun advocates, as well as the states' rights advocates, should be pleased with the new system.

VI. CONCLUSION

There is no doubt that many Americans believe that the federal government is too involved in the minute details of their daily lives; this group of Americans sees only a strong, centralized government. This generalization cannot be readily dismissed. The federal government has pervaded the state government on all levels, including the sub-levels of state government such as county and municipal governments. Some enjoy this involvement; others despise it. After all, the Constitution calls for a federal system that protects the states from overreaching by Congress. Many regulations, however, do in fact need to be promulgated by the federal government. The government, however, simply needs to be careful in the way that it proposes to have these regulations implemented. If the states feel that a federal act is forcing them to perform what is essentially a federal function, cases like *Printz* will arise.

The government has options to carry out its regulatory programs that do not "compel" the states into action. As discussed earlier, ideas such as economic incentives, placing conditions on the receipt of federal funds, or the outright preemption of a particular field by the federal government are all viable options. One thing is clear: the federal government may not compel the states to implement federal programs. Congress, however, often passes legislation that is constitutionally questionable. Some of this legislation poses questions concerning overreaching by Congress, as well as congressional encroachment on state sovereignty. This is a common result when Congress desires to regulate in a manner prohibited by the Constitution.